STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

NICKOLAS JOEL DURKA,

Defendant-Appellant.

UNPUBLISHED
March 1, 2007

No. 265281
Macomb Circuit Court
LC No. 04-001236-FH

Before: O'Connell, P.J., and Saad and Talbot, JJ.

PER CURIAM.

Defendant appeals his jury trial conviction for domestic violence-third offense, MCL 750.81(4), and his sentence of 16 to 24 months' imprisonment. We affirm.

I. Assistance of Counsel

Defendant claims that his lawyer was ineffective. Because defendant failed to preserve this issue for appeal by moving for a new trial or evidentiary hearing in the trial court, our review is limited to errors that are apparent on the record. *People v Johnson*, 144 Mich App 125, 129-130; 373 NW2d 263 (1985). To establish a claim of ineffective assistance, a defendant must show that counsel's performance was deficient and that the deficiency was prejudicial. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994).

Defendant specifically complains that his attorney failed to object and himself elicited testimony from police officers about who they believed initiated the domestic altercation. In support, defendant relies solely on *People v Buckey*, 424 Mich 1; 378 NW2d 432 (1985), which is simply inapplicable to his claim of error. In *Buckey*, the prosecutor repeatedly asked defendant at trial whether other witnesses, including the victim, a police officer, and an eyewitness, were lying in their trial testimony. *Id*. at 7 n 3. Here, no such exchange occurred.

Rather, here, the officers disagreed with each other about who was the aggressor during the domestic altercation. Indeed, the officer who wrote the police report, Officer Carroway, actually believed defendant was the victim, and he characterized the victim as a suspect in his report. On the other hand, Sergeant Sobah believed that defendant was the antagonist and Detective Hannon also concluded that the victim was assaulted. "It is generally improper for a witness to comment or provide an opinion on the credibility of another witness, since matters of credibility are to be determined by the trier of fact." *People v Smith*, 158 Mich App 220, 230;

405 NW2d 156 (1987). Further, it is improper for a witness to express an opinion on the defendant's guilt or innocence of the charged offense. *People v Bragdon*, 142 Mich App 197, 199; 369 NW2d 208 (1985). However, if any error occurred, defendant has not "overcome the strong presumption that his counsel's action constituted sound trial strategy under the circumstances." *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). The record reflects that defense counsel relied on and elicited the testimony to highlight discrepancies in the evidence and to create reasonable doubt regarding defendant's guilt. *Id*. We will not second-guess this strategy and, therefore, defendant's claim is without merit. *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004).

We also reject defendant's claim that his attorney was ineffective for questioning or failing to object to questioning the police officers about their training and experience with interviewing. The questions established the basis for each officer's opinion about which party instigated the altercation. Again, counsel's questions and failure to object to the prosecution's line of questioning were clearly part of a strategy to establish reasonable doubt. Counsel attempted to show varying levels of competence between the officers to argue that Officer Carroway correctly identified defendant as the true victim. The fact that the strategy did not work does not mean that defendant was denied effective assistance at trial, and defendant is not entitled to relief. See *People v Stewart*, 219 Mich App 38, 42; 555 NW2d 715 (1996).

II. Sentence

Defendant maintains that the trial court abused its discretion when it sentenced him to prison when it could have imposed an intermediate sanction. The upper limit of defendant's minimum sentence was 17 months, which qualified him for an intermediate sanction sentence. MCL 769.34(4). Nonetheless, the trial court sentenced defendant for four substantial and compelling reasons: (1) defendant failed to appear for his arraignment and lied about it, (2) he failed to complete two previous probation sentences for domestic violence, (3) he received a major misconduct ticket while in prison, and (4) defendant's criminal history revealed that four of his previous twelve offenses were assault crimes.[1] Defendant contends, incorrectly, that none of these reasons were substantial or compelling enough to justify the trial court's sentence.[2]

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[1] This Court reviews the existence of a compelling and substantial reason for clear error. *People v Babcock*, 469 Mich 247, 264; 666 NW2d 231 (2003). A reason is substantial and compelling if it is objective and verifiable and it "keenly" or "irresistibly" grabs the court's attention. *Id*. at 257. Whether a reason is objective and verifiable is a matter of law and is reviewed de novo. *Id.* at 265. The trial court's determination that a reason is substantial and compelling is reviewed for an abuse of discretion. *Id.* at 264-265. This Court also reviews the extent to which the trial court departed from the guidelines for an abuse of discretion. *People v Lowery*, 258 Mich App 167, 172; 673 NW2d 107 (2003).

[2] We note that all of the reasons cited by the trial court are supported by evidence in the record. Therefore, the trial court did not commit clear error by finding that the incidents existed, and it did not err as a matter of law because all of the reasons are objective and verifiable. *Babcock, supra* at 257, 264.

Defendant's failure to appear at his arraignment and lying to the court demonstrate his disrespect for the judicial system, which undoubtedly "irresistibly" caught the court's attention. In addition, defendant's misconduct indicated to the trial court that defendant was incapable of rehabilitation and deserved a harsher sentence. This conclusion was clearly a substantial and compelling reason to impose a prison sentence rather than an intermediate sanction. Further, defendant's failure to complete probation on two prior occasions is unquestionably "of considerable worth" in deciding defendant's sentence, and shows that probation did nothing to rehabilitate him and clearly did not deter defendant from committing his third domestic violence offense. See *People v Hendrick*, 472 Mich 555, 557; 697 NW2d 511 (2005). Defendant failed to conform his behavior to society's standards after receiving two intermediate sanctions, and, therefore, this reason is also "substantial and compelling."

Defendant's receipt of a major misconduct ticket while he awaited trial was substantial and compelling as yet another example of defendant's unwillingness to conform to the rules. Moreover, the trial court's final reason for imposing sentence—defendant's history of assault crimes—was also substantial and compelling. A trial court is permitted to take into account defendant's criminal history when imposing a sentence. *People v Oliver*, 242 Mich App 92, 98; 617 NW2d 721 (2000). Given defendant's record of committing multiple assaults, the trial court did not abuse its discretion when it departed from the guidelines.

We also find no abuse of discretion in the 16 to 24 month sentence imposed. The sentence was proportionate in light of defendant's crime and his inability to respond to previous intermediate sanctions. Thus, the sentence was appropriate to the offense and offender, and it fell within the principled range of outcomes. *Babcock, supra* at 269.

Affirmed.

/s/ Peter D. O'Connell
/s/ Henry William Saad
/s/ Michael J. Talbot